

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO
THE CARGILL DEFENDANTS' MOTION TO COMPEL THE
STATE TO DESIGNATE DEPONENTS UNDER RULE 30(b)(6)**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), submits its Response in Opposition to "The Cargill Defendants' Motion to Compel Plaintiffs [sic] to Designate Deponents Under Rule 30(b)(6)" [DKT #1270].

I. Introduction

The Cargill Defendants are insisting upon taking deposition discovery of the State's 30(b)(6) designees in the most burdensome, most inefficient, most time-consuming and most costly manner possible.

The Cargill Defendants are one of seven defendant groups in this litigation. The type of conduct that forms the basis of the State's claims is common among the Cargill Defendants and the other six defendant groups. Additionally, the Cargill Defendants have asserted that they are pursuing a joint defense of the State's claims. Despite these facts, the Cargill Defendants have nevertheless refused to coordinate their deposition discovery of the State with the other Defendants in this litigation.

To make matters worse, the Cargill Defendants have served five separate 30(b)(6) notices on the State in an apparent attempt to circumvent the durational limits on depositions.

To be clear: the State does not dispute the Cargill Defendants' entitlement to conduct relevant discovery of the State by means of Rule 30(b)(6). Rather, the State disputes the manner in which the Cargill Defendants seek to proceed with Rule 30(b)(6) discovery. Simply put, the Cargill Defendants' approach to Rule 30(b)(6) discovery in this case is contrary to Fed. R. Civ. P. 1 and 30; it is oppressive, unduly burdensome and expensive. Accordingly, the Cargill Defendants' Motion to Compel should be denied.¹

II. Factual Background

On August 17, 2007, the Cargill Defendants served on the State five separate notices for Rule 30(b)(6) depositions. The five deposition notices demanded that the State provide witnesses to testify about a large and varied number of topics within 16 days. The five deposition notices also demanded five consecutive days of depositions, with the first of the five consecutive days of deposition beginning on Labor Day. *See* Cargill Motion, Ex. 1. On August 22, 2007, the Cargill Defendants realized their scheduling error and proposed moving two days of depositions forward one week.

Given that it is anticipated that the topics noticed by the Cargill Defendants are ones on which the other Defendants will also want to depose a State 30(b)(6) designee, on August 24 and September 7, 2007, the State proposed to the Cargill Defendants, *see* Exs. 1 & 2, and subsequently to the other Defendants, *see* Exs. 3-7, that discussions should be had regarding how to coordinate the depositions of the State's 30(b)(6) witnesses so as to make them more efficient and less burdensome for all parties. The Cargill Defendants refused to consider this proposal,

¹ Contemporaneous with this filing, the State is filing a separate motion for protective order regarding the conduct of 30(b)(6) depositions of the State.

see Exs. 8 & 9, and, like clockwork, the other Defendants responded that they also were not interested in the State's proposal to work towards a reasonable coordinated solution on this matter. *See* Exs. 10-14. Given these responses, it is not unreasonable to surmise that each of the other six defendant groups intends to proceed with its own set of 30(b)(6) depositions of the State.² Under the "go-it-alone" approach being pursued by the Cargill Defendants (whereby each defendant group will take its own separate 30(b)(6) deposition), and at least tacitly endorsed by the other Defendants, this will potentially result in at least six additional 30(b)(6) depositions of the State on likely nearly identical topics. In fact, if the State identifies only one Rule 30(b)(6) designee (which is unlikely), proceeding in this manner will thus require a minimum of seven days of deposition of the State's designee. For each additional designee identified by the State, the total number of days of deposition will increase accordingly.

Further, the Cargill Defendants are seeking a minimum of five days of testimony pursuant to their five separate Rule 30(b)(6) deposition notices. If the other defendant groups take a similar tact of issuing multiple separate Rule 30(b)(6) deposition notices, then the State could be subjected to many additional 30(b)(6) depositions. The Cargill Defendants' approach (tacitly endorsed by the other Defendants) is nonsensical, inefficient, and unduly burdensome.

² The Cargill Defendants try to minimize the fact that all of the Defendants in this case will inevitably want to depose the State's Rule 30(b)(6) designee by making such a proposition seem like a distant uncertainty. The Cargill Defendants' Motion to Compel states, "[a]ssuming for the sake of argument, that one or more of the other Defendants actually will notice a 30(b)(6) deposition of Plaintiffs [sic] at some point in the future, neither the Court, nor the Cargill Defendants, nor Plaintiffs [sic] have any way of telling when such a deposition might be noted or what specific topics such a notice might contain." Cargill Defendants' Motion, p. 9 (emphasis in original). It is evident from the letters from the other Defendants regarding this issue that they will indeed want to take Rule 30(b)(6) depositions. *See* Exs. 10-14. These Defendants inevitably will want to ask questions about the same general issues outlined in the Cargill Defendants' five deposition notices.

Thus, the State respectfully requests that the Court deny the Cargill Defendants' Motion, which will simply result in repetitive and unduly burdensome Rule 30(b)(6) depositions.

III. Rules Pertaining to Depositions of Corporate Designees

Fed. R. Civ. P. 1 states that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Additionally, the Rules presume that a person be deposed only one time in a case. For a person to be deposed more than one time in a case, the party seeking the deposition must seek leave of court. *See* Fed. R. Civ. P. 30(a)(2)(B) ("A party must obtain leave of court if . . . the person to be examined already has been deposed in the case"). Further, Fed. R. Civ. P. 30(d)(1) limits the duration of a deposition to "one day of 7 hours" unless an exception is granted by the court. Finally, "[f]or purposes of this durational limit, the deposition of each person designated under rule 30(b)(6) should be considered a separate deposition." Fed. R. Civ. P. 30, Advisory Committee Notes to the 2000 Amendment.

IV. Argument

The manner in which the Cargill Defendants wish to proceed will result in the State's 30(b)(6) designees being subjected to separate, repetitive depositions. This approach is unreasonable and not within the spirit and meaning of the Federal Rules of Civil Procedure.

The five Rule 30(b)(6) deposition notices served by the Cargill Defendants address various broad topics: (1) "Alleged Pollutants and Contaminants;" (2) "Alleged Runoff or Releases"; (3) "Alleged Legal Violations;" (4) "Grower Interaction;" and (5) "Alleged Human Health Hazard." *See* Cargill Defendants' Motion, Ex. 1. Each notice contains six to eight related areas of inquiry. Although the Cargill Defendants have taken each of the areas of inquiry and added language in an attempt to relate the general topic specifically to the Cargill Defendants,

the fact remains that these areas of inquiry address matters that are common to all of the Defendants.

By way of example, the "Alleged Pollutant and Contaminants" deposition notice, area of inquiry number two reads "[t]he constituents or components of poultry litter / poultry waste specifically generated by the Cargill Defendants or their contract growers alleged to have harmed the environment of the IRW." The Cargill Defendants appear to be seeking a witness who can testify about the constituents or components of the Cargill Defendants' poultry waste. The Cargill Defendants are well-aware of the constituents of concern in poultry waste (*e.g.*, without limitation, phosphorus and pathogens) and that they exist in all Defendants' poultry waste; therefore, this is plainly an area well-suited for coordinated discovery among Defendants. There is no good reason for each Defendant to take a separate deposition of a witness designated to testify about this topic. The other areas of inquiry in the deposition notices are ones that likewise share a large degree of commonality among Defendants.

Moreover, if each Defendant is permitted to serve separate Rule 30(b)(6) notices, this will require each Defendant to seek leave of court in order for the same individuals to be deposed over and over again about these same topics (*e.g.*, the constituents of concern in poultry waste). This process would unnecessarily waste the parties' and the Court's time, and if permitted to go forward, such duplicative depositions would be an undue burden and expense upon the State, and would require the Rule 30(b)(6) designees to offer repetitive testimony for days if not weeks on the same subject matters. The State recognizes that each Defendant should have an opportunity to question the State's Rule 30(b)(6) designees regarding relevant, non-privileged issues in the case. However, it is obvious that can be accomplished in a significantly more efficient manner. One deposition of each of the State's Rule 30(b)(6) designees should be taken, and each

Defendant will have an opportunity to ask questions during that deposition. In fact, Defendants have proceeded in this manner in the various other depositions they have chosen to take in this case,³ and there is no reason they should proceed otherwise with the State's Rule 30(b)(6) designees.

What is more, the serving by the Cargill Defendants of five separate Rule 30(b)(6) notices setting depositions for five separate days (which if permitted could arguably result in five 7-hour days of questioning by the Cargill Defendants alone), reflects an apparent attempt to evade the durational limit on depositions. Such an approach lacks legal authority. The Court in *Canal Barge Co. v. Commonwealth Edison Company*, 2001 WL 817853 (N.D. Ill. July 19, 2001), faced a very similar situation when the defendant served the plaintiff with six Rule 30(b)(6) notices. The plaintiff intended to designate only one Rule 30(b)(6) witness, and took the position that the one-day time restriction of Rule 30(d)(2) should apply to the deposition. *Id.* at *3. Because the one witness was designated to discuss the factually complex issues

³ For example, the deposition of John Littlefield, a contract worker for ODAFF, was taken by the Defendants on August 2, 2007. All of the Defendants participated in the deposition and had an opportunity to ask questions. Counsel for Defendant Simmons and counsel for Defendant Peterson Farms asked the majority of the questions at the deposition, covering Mr. Littlefield's background, experience, and work with ODAFF. Counsel for the remaining Defendants all had an opportunity to ask additional questions, follow up questions, and questions specific to their clients. Theresa Noble Hill, counsel for the Cargill Defendants, even noted the efficiency of this approach on the record. As the fifth counsel to question the witness, Ms. Hill explained:

We'll see if we can keep getting shorter as we go along, Mr. Littlefield. We met earlier today. I'm Theresa Hill, again, and I represent Cargill entities, and I just wanted to go back over a few of the exhibits that we've gotten today.

Ex. 15, Aug. 2, 2007 Deposition of John Littlefield, 177:14-18. Ms. Hill was indeed able to "keep getting shorter" with the questioning and limited her questioning of Mr. Littlefield to only six pages, and she was also able to ask her Cargill-specific questions without a separate, Cargill-specific deposition.

surrounding the repairs of 56 separate barges, the Court held that there was a need to extend the deposition beyond the one-day rule. The Court, however, explained:

[w]hile the court agrees that the scope of this Rule 30(b)(6) deposition requires more than one day of questioning, it finds ComEd's request for six days to be excessive. ComEd has not provided the Court with any case authority for its argument that it can simply serve six separate notices of deposition under Rule 30(b)(6) and be automatically entitled to six full days of depositions regardless of the number of corporate representatives designated by Canal Barge. As Canal Barge points out in its Reply, the solution to the problem lies in requiring ComEd to make efficient use of its time.

Id. at *4 (emphasis added).

Like the defendant in *Canal Barge*, the Cargill Defendants fail to provide authority to demonstrate that they are automatically entitled to five days of depositions merely by issuing five separate Rule 30(b)(6) notices. If the Cargill Defendants believe that more than one day of deposition testimony per designee is needed, they need to demonstrate that need to the Court and seek an extension of the time for the deposition pursuant to Rule 30(d)(2). However, rather than taking a rational approach to this issue and attempting to reach a reasonable compromise with the State, the Cargill Defendants have simply pushed forward with their unwarranted motion to compel.

The common-sense solution to the depositions of the State's Rule 30(b)(6) designees is obvious, but the Cargill Defendants, as well as the other Defendants, refuse to engage in a dialog with the State about it, each demanding to conduct unnecessary, repetitious and unduly burdensome depositions of the same individuals. The State recognizes its obligation to produce Rule 30(b)(6) designees, but the incredibly burdensome and inefficient manner in which the Cargill Defendants, together with the other Defendants, want to proceed is completely unwarranted. The Cargill Defendants and the other Defendants should conduct the depositions of the State's Rule 30(b)(6) designees in the same manner in which they are conducting their

other depositions in this case, by participating together, in one deposition of each designee, with each Defendant having the opportunity to question the witness. The State is not refusing to provide Rule 30(b)(6) designees, but is asking the Court to require that the Cargill Defendants, as well as the other Defendants, move forward in a reasonable and coordinated manner that comports with the Rules and avoids undue burden, expense, and inefficiency.

V. Conclusion

For the reasons set forth herein, the State respectfully requests that the Court deny the Cargill Defendants' motion to compel the State to designate deponents under Rule 30(b)(6).

Respectfully Submitted,

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I hereby certify that on this 5th day of September, 2007, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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